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No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHAN KENDRICK, ET AL.,
Cross-Appellants,

—v.—

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

—and—

SAMMIE J. BRADLEY, ET AL.,
Cross-Appellees.

ON CONDITIONAL CROSS APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

The Adolescent Family Life Act, 42 U.S.C. §§300z et seq., authorizes federal funds to go directly and indirectly to religious organizations and requires all grantees under this federally funded program to involve religious organizations. The question presented is whether a court may both sever and write in assurances through an injunction to make a federal statute that is otherwise unconstitutional on its face and as applied conform to the strict requirements of the Establishment Clause.

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IN THE SUPREME COURT OF THE UNITED STATES

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ON CONDITIONAL CROSS APPEAL FROM THE
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court issued on April 15, 1987 (see Appellant's Appendix ("App.") at 1a-46a) is reported at 657 F. Supp. 1547. The district court's order declaring the statute unconstitutional, filed

April 15, 1987, appears in the Appendix to appellant's jurisdictional statement ("App.") at 47a-49a. The district court's order concerning severability, filed August 13, 1987, appears in the Appendix to this statement ("C. App.") at 1a-7a.

JURISDICTION

This cross-appeal is being docketed pursuant to Rule 12.4, Rules of the Supreme Court of the United States. Cross-appellants received Appellant's jurisdictional statement on August 17, 1987.

Jurisdiction was conferred on the district court pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

42 U.S.C. §§ 300z et seq. provides in pertinent parts:

> [T]he problems of adolescent premarital sexual relations, pregnancy and parenthood . . . are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives.

42 U.S.C. § 300z(a)(8)(A),(B) ("Findings and Purposes") (emphasis added).

> [S]ervices encouraged by the Federal Government should promote the involvement of parents with their adolescent children, and should emphasize the provision of support by other family members, religious and charitable organizations . . . and other groups . . .

42 U.S.C. § 300z(a)(10)(C) ("Findings and Purposes") (emphasis added).

> Demonstration projects shall . . . make use of support systems such as other family members, friends,

> religious and charitable organizations, and voluntary associations.

42 U.S.C. § 300z-2(a) ("Demonstration projects; grant authorization, etc.") (emphasis added).

> An application for a grant for a demonstration project . . . shall include . . . a description of how the applicant will . . . involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives.

42 U.S.C. § 300z-5(21)(B) ("Requirements for applications") (emphasis added)

> Grants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortion or abortion counseling or referral; except that any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescents request such referral; and grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.

42 U.S.C. § 300z-10(a) ("Restrictions").

STATEMENT OF THE CASE

Cross-appellants Chan Kendrick, Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmet W. Cocke, Jr., Shirley Pedler, Reverend Homer A. Goddard, Joyce Armstrong, and John Roberts file this jurisdictional statement to conditionally cross appeal on the issue of severability should this Court note probable jurisdiction on the merits. On August 13, 1987, the U.S. District Court for the District of Columbia found that the references to religious organizations, which the court had found unconstitutional both on their face and as applied, were severable from the remainder of the Adolescent Family Life Act (hereinafter "AFLA").

In 1981 Congress amended an existing secular adolescent pregnancy statute, Health Services and Centers Amendments of 1978, Pub.

L. No. 95-626, Tit. VI, 92 Stat. 3551, 3595, (hereinafter "Title VI"), in order to interject a religious solution to the problem of teenage pregnancy.

During its three years of operation, many influential Senators had grown frustrated with Title VI. Senators Denton and Hatch, key sponsors of the AFLA, were dissatisfied with Title VI because it did not involve the government in teaching the value of abstinence.[1/] The AFLA was also born out of the sponsors' frustration with Title X, the Public Health Service Act, 42 U.S.C. §§ 300 et seq., a federal program established in 1970 that provides the vast majority of federal funding for family planning

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1/ Denton also objected to Title VI because grantees told pregnant teenagers about the availability of abortion and because parental consent was encouraged, but not required. See statements of Senators Denton and Hatch at S. Rep. No. 161, 97th Cong., 1st Sess. 4 (1981); 127 Cong. Rec. S 4310 (daily ed. May 4, 1981); 127 Cong. Rec. S 4246-47 (daily ed. Apr. 30, 1981).

services. They believed that Title X had failed to deal effectively with the problem of adolescent pregnancy.[2/]

Although the AFLA retained many of Title VI's administrative provisions and shared some of Title VI's goals, compare 42 U.S.C. § 300z(b)(3)(A) with Title VI, § 601(b)(1), 92

2/ In a letter to President Reagan dated August 1981, Senators Hatch, Denton, East and Nickles, wrote the following:

> . . . data currently available indicate that teen abortion rates, illegitimacy rates and involvement in premarital sexual activity continue to rise dramatically. In partial response to the failure of the Title X program to deal effectively with adolescents, we introduced the Adolescent Family Life bill
>
> . . . This program is designed to help teens and their families deal with the problems of adolescent sexual relations, including pregnancy. It stresses the need for family involvement and seeks alternatives to abortion.

See Letter attached as Exhibit A to Plaintiffs' Memorandum in Response to Court's Order of April 15, 1987 In Opposition to Severence.

Stat. 3595, the AFLA deviates from Title VI in four fundamental areas. First, the AFLA requires the involvement and active participation of religious organizations, 42 U.S.C. § 300z-5(a)(21)(B); second, the AFLA prohibits any funding to groups which provide abortions or abortion counseling or referrals or subcontracts with groups or persons which do so or which are deemed to advocate, encourage or promote abortion, 42 U.S.C. § 300z-10(a); third, the AFLA instructs grantees actively to encourage adolescents to choose adoption, 42 U.S.C. § 300z-1(a)(4)(B); and fourth, the AFLA requires grantees to emphasize the value of premarital abstinence, 42 U.S.C. § 300z-1(a)(8).[3/]

[3/] The AFLA also requires that parental notification and consent be provided for virtually all AFLA services and added the entirely new prevention component of the program. See 42 U.S.C. § 300z-1(a)(8). Title VI did not contain such provisions.

Significantly of the four major changes only one is unique, that of religious involvement. The "promotion of adoption and premarital abstinence as options and restrictions on the provision of abortion are integral parts of many federal programs which provide services to adolescents." Declaration of Jo Ann Gasper, Deputy Assistant Secretary for Population Affairs of the Department of Health and Human Services. p. 10 par. 9 (June 4, 1987), Defendant's Memorandum Addressing the Severability of 42 U.S.C. § 300z-5(a)(21)(B). These aspects of the program, however, also became unique once promoted by and identified with particular religious organizations.

Furthermore, unlike Title VI which provided a direct service delivery system, the AFLA is a demonstration project designed to explore experimental methods to address

growing rates of teenage pregnancy and teenage sexual activity. S. Rep. No. 804, 98th Cong., 2d Sess. 3 (1984). The AFLA is a program of "small scale" and "not a far-ranging Government entitlement program." S. Rep. No. 161, 97th Cong., 1st Sess. 15-16 (1981)

In making the AFLA a demonstration project, Congress undertook to conduct an experiment on the efficiency of teaching values that required the use of religious organizations and theology to promote those values. Congress believed that by using religious organizations and by inculcating religious values, the AFLA would cure what they perceived to be the inadequacies of Title VI.

Senator Denton made clear that the participation of religious organizations was essential in order for the AFLA to accomplish its experimental purposes. He wrote:

> In the committee's view, provisions for the involvement of religious organizations do not violate the constitutional separation between church and state. Recognizing the limitations of Government in dealing with a problem that has complex moral and social dimensions, the committee believes that promoting the involvement of religious organizations in the solution to these problems is neither inappropriate or [sic] illegal.

S. Rep. No. 161, 97th Cong. 1st Sess. 15, 16 (1981) (emphasis added)

The statute itself stated that the problems of adolescent premarital sexual relations and pregnancy "are best approached through a variety of integrated and essential services provided to adolescents and their families by . . . religious . . . organizations." 42 U.S.C. § 300z(a)(8)(B) (emphasis added).

By repeatedly singling out religious groups as specifically desired participants, Congress indicated that religious groups were to make a unique religious contribution to

the programs. If Congress merely wanted church participation as charitable organizations, it would not have gone to such lengths to require religious organizations as such. By including these groups, Congress made AFLA a distinctly religious program.

As the district court found in its opinion of April 15, 1987:

> The legislative history of these provisions shows without doubt that Congress intended religious organizations to participate in these programs as grantees and as paid or unpaid participants in grants awarded to other organizations. . . . Even more important, the statute, taken as a whole, explicitly permits religious organizations to be grantees and envisions a direct role for those organizations in the education and counseling components of the AFLA grants.

App. at 28a.

The provisions of the AFLA opposing abortion and promoting adoption and abstinence reflect "fundamental tenet[s] of many religions." App. at 30a. The inclusion

of these provisions in the AFLA combined with the contemplated direct and indirect funding of religion under the Act further indicates congressional intent to subsidize the "fundamental religious mission" of certain organizations, App. at 30a, and to make religion an essential and inseparable part of the Act.

The manner in which the statute operated even more clearly indicates that the legislature intended religion to be indispensible to the program. As the district court found:

> The undisputed record before the Court transforms the inherent conflicts between the AFLA and the Constitution into reality. . . .[t]he record reveal[s] the extent to which the AFLA has in fact "directly and immediately" advanced religion, funded "pervasively sectarian" institutions, or permitted the use of federal tax dollars for education and counseling that amounts to the teaching of religion.

App. at 32a-33a.

That Congress reauthorized the AFLA despite specific knowledge of establishment clause problems, further indicates the central role religion was intended to play in the Act. Even after this lawsuit was instituted Congress continued enthusiastically to support the AFLA.[4/] To sever the religious provisions and maintain the AFLA without them clearly violates congressional intent: the resulting program closely resembles Title VI, a program

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[4/] In 1984, HHS authorized new guidelines which prohibited grants from being used to "teach or promote religion." The court dismissed the significance of this action when it wrote:

> [T]his is neither a statutory prohibition nor an official administrative regulation. It is merely an unpublished administrative warning that was written at agency discretion and can be revoked by agency fiat. No case permits a court to find that such a discretionary statement adequately protects against sectarian use of public funds.

App. at 29a.

Congress explicitly rejected in 1981 when it passed the AFLA.

Although the district court found that the AFLA "was not motivated wholly by religious considerations," App. at 22a (emphasis in original), the court found that the Act ". . . is unconstitutional on its face because it has the primary effect of advancing religion and fosters an excessive entanglement between government and religion, and it is unconstitutional as applied because it has the primary effect of advancing religion." App. at 16a. The court's order declared the Act "unconstitutional on its face and as applied only insofar as religious organizations are involved in carrying out the programs and purposes of the Act." App. at 47a-48a. The court ordered "an injunction prohibiting all funding . . . only as it pertains to 'religious organizations'" and ordered the parties to "submit additional

briefs addressing only whether the constitutionally infirm language pertaining to the use of 'religious organizations' under the Adolescent Family Life Act is severable. . . . " App. at 48a.

On August 13, 1987 the court found that the "AFLA's references to 'religious organizations' are severable from the statute." C. App. at 2a. The court found that the absence of a severability clause in the AFLA did not create a presumption for or against severability and that once severed "the remainder of the AFLA is fully operable as law in a manner consistent with the intent of Congress." C. App. at 3a.

THE QUESTION IS SUBSTANTIAL

As the district court found, the AFLA violates on its face and as applied the Establishment Clause. There is no greater public interest than the protection of the

fundamental constitutional rights of taxpayers by the prevention of unconstitutional expenditure of federal monies. See Flast v. Cohen, 392 U.S. 83, 101-104 (1968).

Although it is clear that courts "ought not leap to declare a statute invalid where they can merely proscribe a practice under that law," App. at 3a, it is equally apparent that the court is the final arbiter on matters of constitutional interpretation and has the power "to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). In an effort to "refrain from invalidating more of the [AFLA] than is necessary" C. App. at 3a, the district court went beyond declaring what the law is to legislating and remaking the statute to what it should have been. The district court stated:

> There is nothing in the record before the Court to suggest that the

> intent of Congress to alleviate the problem of teenage pregnancy cannot be effectively carried out without the direct involvement of religious organizations.

C. App. at 4a.

The court's role is not, however, to invent statutes different from those passed by Congress in order to carry out a legitimate purpose. Obviously, Congress can properly reach the issue of adolescent pregnancy, but it is the method which Congress chose and which was found clearly unconstitutional that is at issue in this case. It is a time-honored rule that no court can rewrite legislation to cure statutory defects:

> [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government.

Bowsher v. Synar, 106 S. Ct. 3181, 3193-99 (1986).

I. THERE IS NO PRECEDENT FOR SEVERABILITY IN THIS KIND OF DEMONSTRATION STATUTE.

The only case the district court relies on in severing the statute is Alaska Airlines, Inc. v. Brock, 107 S. Ct. 1476 (1987). That case, however, has facts markedly different from those in the case before this Court and provides strong support for the conclusion that the provisions referring to religious involvement in the AFLA are not severable from the remainder of the Act.

In reaching the severability issue the court found "that both the express language of the AFLA and its legislative history establish that Congress would have enacted the AFLA without its references to 'religious organizations.'" C. App. at 5a. The

language and history, however, do not support the court's conclusion.

As the Statement of the Case demonstrates, supra pp. 5-17, inclusion of religion in the statute was an indispensable part of the Act. The fact that the legislative history only mentions religion once, C. App. at 4a-5a, does not preclude a finding of inseverability. Since the statute itself specified religious organizations not once, but four times on the face of the statute, little comment was necessary to ensure the central role that the religion was to play in the AFLA legislative experiment.

In Alaska Airlines the Court had to determine whether an unconstitutional legislative veto provision could be severed from the remainder of the Employee Protection Program. The Court observed that a legislative veto is by "its very nature. . . separate from the operation of the

substantive provisions of a statute."[5/] 107 S. Ct. at 1480. Furthermore, the Court found that legislative veto power covered only "insignificant" aspects of the Act (emphasis added):

> With this subsidiary role allotted to the Secretary, the veto provision could affect only the relatively insignificant actions he might take . . . . There is thus little reason to believe that Congress contemplated the possibility of vetoing any of these actions and one can infer that Congress would have been satisfied with the duty-to-hire provisions even without preserving the opportunity to veto DOL's regulations.

107 S. Ct. at 1482

In contrast, Congress clearly viewed the participation of religious organizations as vital to the success of AFLA programs.

5/ Despite the "separate nature" of legislative veto clauses, courts have refused to sever unconstitutional legislative vetoes from the remainder of a statute when Congress would have preferred "no statute to one without the one-House veto provision." City of New Haven v. United States, 634 F. Supp. 1449, 1459 (D.D.C. 1986), aff'd, 809 F.2d 900 (D.C. Cir. 1987).

References to religious involvement do not appear as an afterthought but are interspersed throughout the statute, appearing twice in the "Findings and Purposes" section of the statute as well as in two other sections. Courts also look at how the statute has actually operated to infer legislative intent. See Meek v. Pittenger, 421 U.S. 349, 363-65 (1975); Sloan v. Lemon, 413 U.S. 825, 830 (1973). The extensive involvement of religious organizations as found by the district court further demonstrates the inseparability of the religious sections in the statute. App. at 32a-38a.[6/]

Where as here the provisions are deemed so essential and are so interwoven with others, then it cannot reasonably be presumed

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[6/] As the court found "The undisputed record before the Court transforms the inherent conflicts between the AFLA and the Constitution into a reality." App. at 32a.

that the legislature intended the statute to operate otherwise than as a whole. When the unconstitutional and constitutional portions of a statute "are necessary parts of one system . . . the whole Act will fall with the invalidity of one clause. When there is no such connection and dependency the Act will stand . . . ." Huntington v. Worthen, 120 U.S. 97, 102 (1887); accord, Field v. Clark, 143 U.S. 649, 695-96 (1892); see also City of New Haven v. United States, 809 F.2d 900, 909 (D.C. Cir. 1987)(holding legislative veto provision inseverable because without the provision, the statute would fall prey to the very uses Congress was bent on preventing); Hill v. Wallace, 259 U.S. 44, 70-72 (1922)(refusing to sever the unconstitutional portions of a statute despite the existence of a severability clause as the invalid provisions were so interwoven with the remaining Act).

Relying solely on Alaska Airlines, the district court also concluded that the "legislative history establish[es] that Congress would have enacted the AFLA without its references to 'religious organizations.'" C. App. at 5a. The court, however, applied the wrong test given the unique legislative history of the AFLA. The severability inquiry is necessarily fact-oriented and case-specific. Because the AFLA replaced Title VI, the appropriate test is not whether Congress would have enacted some legislation to address the problems of adolescent pregnancy but whether they would have replaced a functioning program with a new one.

Moreover, to the extent that the legislative intent is unclear, this Court has ruled that if "the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional

feature, then the statute must fall." El Paso & Northeastern Ry. v. Gutierrez, 215 U.S. 87, 97 (1909) (emphasis added).

Finally, the Adolescent Family Life Act is distinguishable from all cases finding severability. In those cases where the court found the statute to be severable there was a clear legislative intent plus at least one of three factors. First, in many of the most important cases establishing criteria for severability the court, in fact, ruled in explicit reliance on the existence of a severability clause. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985); Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234-35 (1932); INS v. Chadha, 462 U.S. 919, 932 (1983); and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).[7/]

[7/] If "radical dissection" is necessary to preserve the statute, severance is inappropriate despite the presence of a severability clause. See Thornburgh v. American Coll. of Obst. & Gyn., 106 S. Ct. 2169, 2181 (footnote cont'd)

In the AFLA the absence of both a severability clause and assurances of secular use of the funds further indicate that Congress intended religion to be an inseparable part of the Act.

Second, in a significant portion of the cases in which severability was found, the statute involved detailed and comprehensive acts or unique statutes which formed the only regulatory check or significant legislation in a given area. See Buckley v. Valeo, 424 U.S. 1, 108 (1976)(severance in the context of the comprehensive federal election statute); Consumer Energy Council v. F.E.R.C., 673 F.2d 425, 444-45 (D.C. Cir. 1982)(noting the issue of burden of proof irrelevant and severing from remaining provisions of the unique Natural Gas Policy

(1986) (citing Akron v. Akron Center for Reproductive Health Inc., 462 U.S. 416, 445 n.37 (1983)); Hill v. Wallace, 259 U.S. 44 (1922); Railroad Retirement Board v. Alton R.R., 295 U.S. 330 (1935); Williams v. Standard Oil Co., 278 U.S. 235 (1929).

Act), aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council, 463 U.S. 1216 (1983); NLRB v. Jones & Laughlin Steel, 301 U.S. 1 (1937)(severing in light of the comprehensive "sweep of the provisions" of the National Labor Relations Act); Regan v. Time, Inc., 468 U.S. 641, 659 (1984)(opinion of White, J.)(severing unconstitutional portions of statutory ban on photographic reproduction of U. S. currency); Alaska Airlines, 107 S.Ct. at 1478 (severing the legislative veto section of the Airline Deregulation Act which represented a "major change" and "fundamental redirection" in the regulation of air transportation).[8/] The AFLA is a small experimental program, one of approximately forty-three federal programs,

[8/] See also El Paso & Northeastern Ry. v. Gutierrez, 215 U.S. 87, 97 (1909)(severance of unconstitutional portions permissible where in enacting the statute, Congress intended to change existing common law rules and the provisions at issue were of incremental importance to that change).

guarantees or protections that in some way address or provide services to pregnant adolescents and their families.[9/]

And finally, in many cases, the severed unconstitutional section appeared once and was an isolated part of the statute often appearing at the end of the statute. See Alaska Airlines, 107 S. Ct. at 1485-86 (1987); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506-07 (1985); Tilton v. Richardson, 403 U.S. 672, 683-84 (1971) (opinion of Burger, C.J.) (the 20 year clause was a discreet and independent provision of the Act). In the AFLA the religious provisions are interwoven throughout the statute and are part of one integrated program.

9/ See Moore, Adolescent Parents: Federal Programs and Policies, Urban Institute, Washington, D.C., Summer 1983.

To remove the religious presence from these programs would dramatically alter many AFLA programs and cause them to function in a manner not contemplated by Congress. Under the guidelines enunciated in the leading cases on severability, including Alaska Airlines, it is clear that the provisions referring to religious involvement in the AFLA are not severable from the remainder of the Act.

II. THE DISTRICT COURT'S ORDERS WILL NOT SOLVE THE ESTABLISHMENT CLAUSE VIOLATIONS CREATED BY THE AFLA.

The district court concluded that without the references to "religious organizations" "the primary purposes of the AFLA can continue to be accomplished" and that the AFLA is fully and "constitutionally operative." C. App. at 5a. First, it is clear that actual legislative intent is the overriding question, and operability is only even arguably determinative if the statute

would not be operable without the severed portions. See Alaska Airlines, 107 S. Ct. at 1480-81 (1987).[10/]

As the D.C. Circuit has formulated, "the ultimate inquiry in a severability case is not whether the statute may somehow continue to function after excision of the invalid portion, but rather whether it continues to function in a manner consistent with congressional intent." City of New Haven v. U.S., 809 F.2d 900, 906 (D.C. Cir. 1987) (emphasis in original). Similarly, this Court stated in Alaska Airlines, "[t]he independent operation of a statute . . . could be said to indicate little about the intent of Congress regarding severability"; rather, "[t]he more relevant inquiry in

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10/ In Buckley v. Valeo, the Supreme Court held the invalid portions of a statute severable, unless the legislature would not have enacted the statute without the severed portions, "if what is left is fully operative as law." 424 U.S. at 108 (emphasis added).

evaluating severability is whether the statute will function in a manner consistent with the intent of Congress." Alaska Airlines, 107 S. Ct. at 1480-81 (emphasis in original).

Contrary to the court's ruling, the excision of the references to religious organizations in the statute would fundamentally alter the remaining provisions and the experimental purpose of the project. Furthermore, even if operable in some sense, the statute would not function constitutionally. Because this act has been in effect for over six years, removing the references to religion in the AFLA would not cure the Establishment Clause problems.

The mandate for religious involvement and the promotion of religious beliefs permeates the entire administration and operation of the Act. Since the pendency of the case, HHS has more than doubled funding

to identifiable religious groups. And HHS has engaged in five years of endorsed and mandated entanglement. In addition, the district court's order does not provide for the constitutionally mandated "means for ensuring" that AFLA funds will not be used to promote or advance religion.[11/] See Wolman v. Walter, 433 U.S. 229, 240 (1977) (opinion of Blackmun, J.).[12/]

As the district court found, the AFLA "statutory scheme is fraught with the

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11/ Nor can the Court assume appropriate monitoring currently exists: "where Congress intends to impose a condition on the grant of federal funds, 'it must do so unambiguously.'" School Bd. v. Arline, 107 S.Ct. 1123, 1132 (1987) (Rehnquist, C.J., dissenting) (quoting Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). As the district court found, the requirement in the AFLA 1984 Notice of Grant Awards that grantees not promote religion is not a substitute for such assurance in the statue itself. App. at 29a.

12/ The Ohio statute in Wolman explicitly provided: "No school district shall provide services, materials, or equipment for use in religious courses, devotional exercises, religious training, or any other religious activity." 433 U.S. at 235 n.5 (opinion of Blackman, J.).

possibility that religious beliefs might infuse instruction and never be detected by the impressionable and unlearned adolescent to whom the instruction is directed." App. at 30a-31a. The HHS employees, grant recipients and grant readers have from the beginning carried out the religious purposes of the Act. Persons with certain religious beliefs were selected to read and choose grantees,[13/] HHS employees condoned and

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13/ In accordance with the AFLA's mandate to involve religion in the programs, Ms. Mecklenburg selected a large proportion of external readers who were either employed by religious organizations or had other religious affiliations. It is clear from written comments made by the readers on their scoring sheets that readers were aware that the intention of the AFLA was to promote a religious solution to the problem of teenage pregnancy. Readers were aware that many programs were asking for funding to promote specific religious tenets or institutions, often to benefit only small, denominational audiences. Other comments by field readers indicate a preference for certain religious beliefs and attitudes, such as including natural family planning in programs. Some reviewers showed themselves to be biased against certain applicants that did not promote particular beliefs, either religious and/or anti-abortion. Conversely, comments show readers saw the lack of religion as violating the statute. See Plaintiffs' multi volume
(footnote cont'd)

encouraged involvement of religious organizations and religious ideology[14/] and HHS employees selectively enforced statutory provisions to further particular religious activities.[15/]

One HHS program supervisor described the AFLA to new grantees as a joint project between church and state (FACTS, 236). And Ms. Mecklenburg, the director of the Official Adolescent Pregnancy Program until 1985, stated that any intention of the applicants to teach values in a church setting was consistent with the goals of the AFLA (FACTS, 123, 124).

Grant recipients have been religious organizations or extensively involved

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Statement of Facts filed with District Court. "FACTS" 83, 100, 102, 104, 113, 121, 122, 127, 130.

14/ See FACTS 108, 109, 110, 226, 223, 225, 235, 236; Peterson dep. at 136-137; Rosengard dep. at 89-91.

15/ Id.; FACTS 232; FACTS, St. Ann's, 102, 103; FACTS, St. Marg. 60, 127, 130, 99, 107; FACTS, FAF, 53; FACTS 223.

religious groups. Audiences have been limited to particular religious groups and at least one grantee has counted "spiritual counseling" as an "in kind" federal contribution. The AFLA funds the development of curricula, often on the basis of an outline alone. All preparation of training, teaching and testing in prevention programs and counseling in care programs is done by the grantees. Each of these programs lends itself to abuse in the form of constitutionally infirm indoctrination.

Even the secular grantees associate themselves, as the statute mandates them to, with local churches and clergy members. And even when they use secular teachers, the subject matter is unambiguously ideological and shaped to meet the approval of local religious leaders, and the programs are often presented on religious premises under the sponsorship of a church.[16/] Thus, even the

"secular" AFLA programs present as much opportunity for the transmission of sectarian views as did the programs at issue in Sloan v. Lemon, 413 U.S. 825 (1973) and Meek v. Pittenger, 421 U.S. 349 (1975).

The surveillance needed to prevent government funding of religion in AFLA programs will constitute precisely the kind of "excessive and enduring entanglement" that

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16/ For example, one of the "secular" grantee's ["SeMo"] aims is to aid the churches to achieve their stated goals (FACTS, SeMo 4) and SeMo's grant application notes that one beneficial outcome of the AFLA project is that families and churches would have been helped in communicating their values more effectively (FACTS, SeMo 6). See also Memorial General Hospital where the staff in one workshop presentation consisted of a minister and AFLA project staff "if needed" (FACTS, MGH 4); Cities-In-Schools where a member of Here's Life Washington (a religious organization) participated in in-service education programs (FACTS, CSS 9); Northwest Louisiana Adolescent Family Life Project where an AFLA program was presented at Belcher Presbyterian Church with the minister presenting a session on Biblical perspectives on love (FACTS, N.La. 7). See also Lyon County Health Dept. which presented its "Growing Up -- A Good Time" to some public schools. The stated philosophy of the GUAGT course is that "Family values, religious beliefs . . . must be included in promoting a healthy understanding of human sexuality." (FACTS, Lyon 18.)

has doomed such past efforts. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971). Even for secular AFLA grantees, or those not pervasively sectarian, the absence of such a limitation built in originally to the statute is fatal.17/

17/ As the court found, the requirement in the AFLA 1984 Notice of Grant Awards that grantees not promote religion is not a substitute for such an assurance in the statute itself. App. at 29a n. 13.

Furthermore they have not been effective. In response to HHS's letter to St. Margaret's about asking them to stop teaching Catholic religious dogma in parochial schools, St. Margaret's stated that it was segregating the federal funds allocated for ALFA prevention services (FACTS, St. Marg. 108-111). To date, however, plaintiffs have no documents which indicate how that would be accomplished, or indeed whether it has actually been done. In fact, HHS has condoned St. Margaret's second curriculum (the one to be used in public schools), although it is virtually identical to the Catholic curriculum. It teaches, as fact, Catholic dogma on abortion and contraception. The only difference is that the explicit religious references to "religion" and "God" have been deleted (FACT, 110); the religious doctrines remain. Ms. Mecklenburg "advised" St. Margaret's "to discontinue using the curriculum presently in use in parochial schools . . .," but did not extend any guidelines as to the public school curriculum. (FACTS, St. Marg, 108, 109, 110; Peterson dep. at 136-137; Rosengard dep. at 89-91.)

III. WHERE THE AID TO RELIGION IS OBVIOUS AND SIGNIFICANT AS IT IS IN THE AFLA, COURTS HAVE REFUSED TO SEVER THE STATUTE.

In this case the district court has not only severed out language appearing throughout the statute but also has done the equivalent of writing in statutory assurances through an injunction prohibiting all funding of religious organizations to guarantee that federal funds are not used to promote or advance religion. App. at 48a. Never before in an Establishment Clause case has a court engaged in such extensive statutory surgery.

In Sloan v. Lemon, 413 U.S. 825 (1973), the Court invalidated under the Establishment Clause a state statute which reimbursed parents for a portion of tuition expenses incurred in sending their children to non-public schools. The Court was asked to treat the law as "containing a separable provision for aid to parents of children attending nonpublic schools that are not church

related." 413 U.S. at 833. The Court refused this invitation and affirmed the lower court's finding that:

> in view of the fact that so substantial a majority of the law's designated beneficiaries were affiliated with religious organizations, it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools. . . . The statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted.

413 U.S. at 833-834; see also Americans United for the Separation of Church & State v. Dunn, 384 F. Supp. 714, 722 (M.D. Tenn. 1974), vacated on other grounds, 421 U.S. 958 (1975); Public Funds for Public Schools v. Byrne, 444 F. Supp. 1228 (D.N.J. 1978), aff'd, 590 F.2d 514 (3rd Cir.), aff'd mem., 442 U.S. 907 (1979).[18/] Like the programs at

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[18/] In Public Funds, the court refused to sever an (footnote cont'd)

issue in these cases, the involvement of religious organizations in the AFLA programs is pervasive.

In Meek v. Pittenger, 421 U.S. 349, 371 n.21 (1975), the Court refused to sever the constitutional provision, even though the statute contained a severability clause,

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unconstitutional statute providing tax deductions for parents with children in non-public schools and wrote:

> In view of the fact that the overwhelming majority of beneficiaries of the statute as written would be parents of children attending religiously affiliated . . . schools, it is extremely unlikely that the . . . legislature would have provided this deduction only for the parents of that comparatively small number of children who attend non-sectarian private schools.

444 F. Supp. at 1232.

In Americans as in Public Funds, the court did not find it necessary to consult the legislative history of the statute in order to come to its ruling on severability. Instead, the courts examined the manner in which the statute operated and concluded that the legislature did not intend for the statute to operate in such a dramatically different fashion.

finding that it was a "minor" part of the Act and noting that the state would not have necessarily passed the law solely to provide aid found not to be offensive. See also Rhode Island Fed'n of Teachers v. Norberg, 479 F. Supp. 1364, 1373-74 (D.R.I. 1979), aff'd, 630 F.2d 855 (1st Cir. 1980).

This Court has refused to sever statutes even where there has been a finding that the statute was not wholly motivated by religious purposes.[19/] Many statutes violating the Establishment Clause have been struck down in their entirety despite a finding of secular purpose.[20/]

19/ Similarly, the pervasive presence of religion in the AFLA renders the "valid secular purpose" of the Act, App. at 22a, irrelevant to the severability analysis.

20/ In Meek v. Pittenger, 421 U.S. 349 (1975) the Court found that a statute providing auxiliary services to predominantly religious schools was violative of the Establishment Clause and refused to sever constitutional portions of the statute despite the "secular legislative purpose." 421 U.S. at 368, 371 n.21; in Sloan v. Lemon, 413 U.S. 825, 829, 833-34 (footnote cont'd)

Tilton v. Richardson, 403 U.S. 672 (1971), one of the only Establishment Clause cases in which the Court chose to sever a statute containing a provision in violation of the Establishment Clause, is clearly distinguishable from this case. There the Court sustained the constitutionality of a federal statute that provided construction

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1973), the Court found a statute providing tuition reimbursements to parents of children attending predominantly religious schools violative of the Establishment Clause and refused to sever despite the presence of underlying secular purposes; recently, in Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985), the Supreme Court accepted the lower court holding that Michigan's Community Education and Shared Time programs were "manifestly secular." While recognizing that providing for the education of school children is a "praiseworthy purpose," this Court went on to hold:

> But our cases have consistently recognized that even such a praiseworthy, secular purpose cannot validate government aid to parochial schools when the aid has the effect of promoting a single religion or religion generally or when the aid unduly entangles the government in matters religious.

Id. at 382.

grants to universities, except for a portion of the statute which limited to twenty years the authority of the government to recover grants that were used for religious purposes.[21/] The Court severed the twenty year limit and wrote:

> We have found nothing in the statute or its objectives intimating that Congress considered the 20-year provision essential to the statutory program as a whole. . . [T]here is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect.

Id. at 684. Although Congress did not consider the unconstitutional provision in Tilton to be of great significance, it is undisputed that Congress viewed the religion provisions as necessary and essential to the

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21/ In striking down this provision, the Court held that the possibility that a grantee would use federally financed buildings for religious purposes twenty years hence could have the effect of advancing religion. 403 U.S. at 683.

success of the AFLA. Furthermore, the statute in Tilton contained explicit statutory restrictions on the use of the Federal funds and there had been a track record of careful enforcement under the Act:

> The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. It authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship. These restrictions have been enforced in the Act's actual administration . . . .

Id. at 679-80 (emphasis added). As the district court found, the AFLA has neither assurances nor an established track record:

> . . . the AFLA contains no restrictions whatsoever against the teaching of religion qua religion or any attempt to use the education and counselling process to "intentionally or inadvertently" inculcate religious belief. . . . This absence of any statutory prohibition on [sic] inculcation of religious belief puts the AFLA in a class by itself. The Court knows of

> no other statutory scheme that expressly contemplates religious involvement in a government-funded program and does not attempt to segregate inculcation of religious belief from public financial support.

App. at 29a & n.13.

The district court's injunction against funding religious groups attempts to write in at least some of the assurances the statute should have had in the first place. This Court, however, has never inferred saving restrictions in Establishment Clause cases. The facial omission of such assurances has rendered unconstitutional statutes giving explicitly secular nonideological aid solely because of the risk that a religious mission might be advanced. See, e.g., Levitt v. Committee for Public Educ. & Religious Liberty, 413 U.S. 472 (1973); Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).[22/]

Furthermore, this Court has specifically addressed the question of the judicial infusion of cautionary language into the legislative statutory scheme. As explained in Hill v. Wallace, 259 U.S. 44 (1922), it is not within the scope of judicial duty to ensure severability by "dissect[ing] an unconstitutional measure and refram[ing] a valid one . . . by inserting limitations it does not contain. This is legislative work beyond the power and function of the court." Id. at 70. The Court concluded, "to introduce words of limitation, . . . would be to make a new law, not to enforce an old one. This is no part of our duty." Id. at 71 (citing United States v. Reese, 92 U.S. 214, 221 (1876)). In keeping with cardinal

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22/ Conversely, the presence of such statutory assurances has been relied on by the Court in finding constitutional aid to religious colleges, determined not to be pervasively sectarian. Roemer v. Board of Public Works, 426 U.S. 736, 759 (1976).

principles of separation of powers, the judiciary is charged with enforcing the Constitution to its limits and the legislature with writing laws in conformance to those limits.

Rather than uphold the district court's severability order and injunction, this Court should instead declare the AFLA unconstitutional in its entirety, uphold the principles of the Establishment Clause, and set the course for Congress to act in accordance with Constitutional limits on its legislative power.

CONCLUSION

For the foregoing reasons this Court should note probable jurisdiction on the conditional cross appeal if it also notes probable jurisdiction on the merits.

Respectfully submitted,

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Dated: Sept. 16, 1987

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAN KENDRICK, REVEREND ROBERT E. VAUGHN, REVEREND LAWRENCE W. BUXTON DR. EMMET W. COCKE, JR., SHIRLEY PEDLER, REVEREND HOMER A. GODDARD, JOYCE ARMSTRONG, JOHN ROBERTS and THE AMERICAN JEWISH CONGRESS, Plaintiff,	)	Civil Action No. 83-3175
DR. OTIS R. BOWEN, JR., Secretary of the Department of Health and Human Services, Defendants, and SAMMIE J. BRADLEY, KATHERINE K. WARNER and UNITED FAMILIES OF AMERICA, Defendant-Intervenors.	)	

ORDER

I. SEVERABILITY

On April 15, 1987, this Court rendered an Opinion and entered an Order and Judgment holding that the Adolescent Family Life Act

("AFLA"), 42 U.S.C. §§ 300z to 300z-10, is unconstitutional on its face and as applied insofar as religious organizations are involved in carrying out the programs and purposes of the Act. See Kendrick v. Bowen, 657 F. Supp. 1547, 1551 (D.D.C. 1987). Pursuant to the April 15, 1987 Order of the Court the parties submitted briefs on the issue of whether the constitutionally infirm language of the AFLA, namely its references to "religious organizations," is severable from the Act in light of the Supreme Court's decision in the case of Alaska Airlines, Inc. v. Brock, 107 S. Ct. 1476 (1987). On August 11, 1987, after all parties had an opportunity to brief the issue of severability, the Court held oral argument. Upon consideration thereof and the entire record herein, the Court finds that the AFLA's reference to "religious organizations" are severable from the statute and that the remainder of the AFLA is fully operable as law

in a manner consistent with the intent of Congress.

The absence of a severability clause in the AFLA does not create a presumption for or against severability. E.g., Alaska Airlines, 107 S. Ct. at 1481. In carrying out its duty to "refrain from invalidating more of the [AFLA] than is necessary," the Court must sever the AFLA's references to "religious organizations" if what is left is fully operative as law and will function in a manner consistent with the intent of Congress. Id. at 1480-81.

When Congress enacted the AFLA, its purpose was to alleviate the problem of teenage pregnancy. 42 U.S.C § 300z(b); Kendrick, 657 F. Supp. at 1358-60. The involvement of religious organizations was just one means of addressing this problem and not the primary reason why Congress enacted the AFLA. The AFLA refers to "religious organizations" only four times, and

in only one instance, where grant applicants must describe how they

> will . . . involve families, . . . religious and charitable organizations, voluntary associations, and other groups . . . .

42 U.S.C. §300z-5(a)(21), is a reference to "religious organizations" made in the operative part of the statute. Thus, religious organizations are just one of many entities that Congress wanted to be involved in combatting the problem of teenage pregnancy. 42 U.S.C. § 300z(b); Kendrick, 657 F. Supp. at 1558-60.

There is nothing in the record before the Court to suggest that the intent of Congress to alleviate the problem of teenage pregnancy cannot be effectively carried out without the direct involvement of religious organizations. Indeed, religious organizations are mentioned only once in the

entire legislative history. There are numerous secular organizations that can fulfill the AFLA's purpose without transcending the separation of church and state required by the Establishment Clause.

Thus, the Court finds that both the express language of the AFLA and its legislative history establish that Congress would have enacted the AFLA without its references to "religious organizations." Absent those references the primary purposes of the AFLA can continue to be accomplished. Alaska Airlines, 107 S. Ct. 1480-81. Moreover, the AFLA is fully and constitutionally operative as law in a manner consistent with the intent of Congress absent its reference to "religious organizations." Id.

II. DEFENDANT'S RULE 59(e) MOTION

The remaining matter pending before the Court is defendant's Rule 59(e) motion. Specifically, defendant moves this Court to define "religious organizations," to clarify whether religious organizations awarded grants prior to this Court's injunction may receive previously awarded funds that have yet to be distributed, and what current grantees constitute "religious organizations." The Court is puzzled that defendant has asked it to define the term "religious organizations" when defendant applied this term on a regular basis in awarding grants under the AFLA. Nevertheless, the Court has reviewed its Order of April 15, 1987 and finds that the language of the Order is clear. Moreover, as plaintiffs have demonstrated, the Court referred to the term "religious organization" numerous times throughout its Opinion

(seventeen by plaintiff's count). There is also ample precedent in numerous statutes and federal regulations defining the term "religious organizations." Finally, to the extent that defendant seeks clarification in order to abide by this Court's injunction, that problem is now moot in light of the Supreme Court's recent stay of said injunction.

Accordingly, it is, by the Court, this 13th day of August, 1987,

ORDERED that the term "religious organization" is hereby severed from the AFLA in all places that it appears; and, it is

FURTHER ORDERED that defendant's Rule 59(e) motion is hereby denied; and, it is

FURTHER ORDERED that this case is dismissed from the docket of this Court.

/S/ Charles R. Richey
Charles R. Richey
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAN KENDRICK, REVEREND ROBERT E. VAUGHN, REVEREND LAWRENCE W. BUXTON, DR. EMMETT W. COCKE, JR., SHIRLEY PEDLER, REVEREND HOMER A. GODDARD, JOYCE ARMSTRONG, JOHN ROBERTS, and THE AMERICAN JEWISH CONGRESS,	
Plaintiffs,	Civil Action 83-3175-CRR
v.	
DR. OTIS R. BOWEN, JR., Secretary of the Department of Health and Human Resources,	
Defendant,	
and	
SAMMIE J. BRADLEY, KATHERINE K. WARNER and UNITED FAMILIES OF AMERICA,	
Defendant-Intervenors.	

NOTICE OF CROSS-APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given this 25th day of August, 1987, that plaintiffs Chan Kendrick, Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmett W. Cocke, Jr., Shirley Pedler, Reverend Homer A. Goddard, Joyce Armstrong, and John Roberts hereby Cross-Appeal on the issue of severability to the Supreme Court of the United States from the final judgment of this Court entered August 13, 1987.

This Cross-Appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101(a).

Respectfully submitted,

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Date: August 25, 1987

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